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BEFORE THE ARIZONA CORPORATION COMMISSION

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AZ CORP COMMISSION
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Arizona Corporation Commission

DOCKETED

OCT 7 2011

DOCKETED BY

IN THE MATTER OF THE FORMAL
COMPLAINT OF SWING FIRST GOLF LLC
AGAINST JOHNSON UTILITIES LLC

DOCKET NO. WS-02987A-08-0049

REPLY TO JOHNSON UTILITIES'
RESPONSE

Swing First Golf LLC ("Swing First"), hereby replies to "Johnson Utilities' Response in Opposition to Swing First Golf's Pleading Captioned Withdrawal of Complaint" ("Johnson's Response"). Johnson Utilities LLC ("Johnson") claims that Swing First cannot withdraw its voluntary complaint. Johnson's Response is contrary to its positions in the Superior Court case and misstates the law. Johnson's Response is the latest example of its bad-faith litigation tactics.¹ Johnson asks the Commission to help it strain Swing First's resources by forcing it to litigate the same case in two different dockets. Johnson's Response should be rejected.

I JOHNSON IS ARGUING OUT OF BOTH SIDES OF ITS MOUTH

A Johnson Urged Swing First to Withdraw Its Complaint

In its September 21, 2011, omnibus pleading in this docket, Johnson urged Swing First to withdraw its complaint:

Johnson Utilities, LLC ("Johnson Utilities" or the "Company") strenuously opposes the Motion and urges that instead of further delaying this proceeding, SFG should withdraw its complaint against the Company."²

Johnson agreed with Swing First that "'there is no reason to waste the Commission's resources on a moot case.'"

¹ See, Notice of Inappropriate Discovery and Litigation Tactics, dated February 20, 2009, in this docket.

² "Johnson Utilities' (1) Opposition to Swing First Golf's Motion For Continuance; (2) Proposed Procedural Schedule; and (3) Notice of Change of Address of Legal Counsel," dated September 21, 2011, at p. 1. Emphasis added.

1 Just six days later, Swing First agreed to withdraw its complaint. Incredibly, Johnson has
2 pivoted 180 degrees and now opposes Swing First's withdrawal.

3 **B Johnson Tells the Court a Different Story**

4 First, it is important to note that Johnson chose to file its claims against Swing First in
5 Superior Court. Johnson filed its Superior Court Complaint on January 9, 2008.³ With this
6 filing, Johnson acknowledged the jurisdiction of the Superior Court to provide it complete relief.

7 Swing First's Commission Complaint was not filed until January 25, 2008. Because the
8 correct rates for irrigation service were still at issue, Swing First moved to dismiss the Court case
9 on the basis, among others, that Commission expertise was needed to sort out the rate issues.

10 Johnson vigorously opposed the motion, arguing that the Court had jurisdiction.

11 JUC certainly did not sue Swing First in order to determine the correct amount
12 that JUC should have billed Swing First. Rather, JUC asserts a breach of
13 contract/collection claim predicated on a service contract subject to utility rates
14 that have already been approved by the ACC as reasonable. JUC's contract claim
15 does not implicate any technical issues whatsoever, but merely alleges that Swing
16 First has failed to pay for services at the filed rates, and has not met its contractual
17 obligation to make minimum effluent purchases from JUC. This case has
18 absolutely nothing to do with the ACC's plenary constitutional authority to
19 determine just and reasonable rates.⁴

20 Subsequently, Johnson told the Commission in this very docket that its tariffed rate for
21 effluent deliveries is \$0.62 per thousand gallons delivered.⁵ Johnson told the Commission that
22 its tariffed rate for CAP-Water deliveries is \$0.83 per thousand gallons delivered.⁶ Finally,
23 Johnson told the Commission that it "is legally bound to charge the Commission-approved rates
24 and charges."⁷ Swing First agrees with all these assertions.

³ Johnson Utilities L.L.C. v. Swing First Golf, L.L.C. (Maricopa County Superior Court Docket No. CV 2008-000141).

⁴ Plaintiff's Response to Defendants' Motion to Dismiss and Memorandum of Points and Authorities, dated May 7, 2008. Emphasis added.

⁵ Johnson's Motion for Summary Judgment, dated December 4, 2008, at p. 9.

⁶ *Id.*

⁷ *Id.*

1 With these admissions, we now know the appropriate tariff rates for all water sales at
2 issue. The Commission need not set rates or determine the appropriate rates to be charged. The
3 Court can now do its work.

4 **II The Superior Court Has Complete Jurisdiction**

5 **A Johnson Misleads the Commission**

6 First, Johnson inappropriately relies on a 2008 Order from Judge Dunevant. Johnson's
7 reliance is misplaced. Judge Fink, the current judge, has now set the case for trial. He is not
8 waiting for any action by the Commission. Judge Dunevant's 2008 Order is moot.

9 Second, Johnson falsely summarizes Judge Dunevant's ruling: "Judge Dunevant, the
10 original judge assigned in the Superior Court Case, appropriately recognized the exclusive
11 jurisdiction of the Commission to address disputes over rates and charges and customer
12 service."⁸ Judge Dunevant never said this.

13 Third, Johnson misleads the Commission by omitting Judge Dunevant's key qualifying
14 phrase. The Judge actually said (with the omitted phrase underlined). "Regardless of whether
15 this Court has concurrent jurisdiction, the Court is of the opinion that it should refrain from
16 becoming involved until the Corporation Commission has made its initial determination."⁹

17 Now, as just discussed, there is nothing left for the Commission to determine. The
18 parties all agree as to the correct rates and tariffs for the services at issue.

19 The Court is now free to exercise its jurisdiction, and has done just that. It has removed
20 the case from the inactive calendar and set it for trial.

21 **B Johnson Knowingly Misstates the Law**

22 Johnson misled the Commission by incorrectly summarizing Judge Dunevant's minute
23 order and by omitting a key qualifying phrase. Johnson further misleads the Commission by
24 knowingly misstating the law.

⁸ Response at p. 8.

⁹ Minute Order dated May 27, 2008.

1 Johnson cites *Qwest Corporation v. Kelly*, 204 Ariz. 25, 59 P.3d 789 (Ariz. App. Div. 2,
2 2002), but twists its summary to make it appear that *Kelly* supports Johnson's position. *Kelly* is
3 actually contrary to Johnson's position.

4 In *Kelly*, customers filed a class action lawsuit against Qwest arising from their purchase
5 of Qwest's linebaker service. The customers asserted both contract and tort claims. Qwest
6 moved to dismiss the complaint, arguing that the Commission had "exclusive and plenary
7 jurisdiction over all matters."¹⁰ The *Kelly* court disagreed, concluding that the Court had
8 jurisdiction to hear the complaint.

9 First, like in *Swing First's* court case against Johnson, the fundamental issue in *Kelly* was
10 whether the utility committed a civil wrong against its customer(s).

11 [The customer] had raised "relatively simple tort and contract issues revolving
12 around a central inquiry: whether, under traditional judicial principles, appellees
13 committed a civil wrong against appellant."¹¹

14 Judge Fink similarly ruled that the jury would have to apply contract principals to determine
15 whether Johnson overcharged *Swing First*:

16 The principal difficulty is that, as the Corporation Commission found, Johnson's
17 records have been inadequate. The Court is left to fill in the gaps. Filling in gaps
18 is an exercise in factfinding that must be left for the jury.¹²

19 Similarly, in addition to the contract issues, the jury must decide multiple tort issues—
20 including trespass, negligence, and defamation—which the *Kelly* court says are clearly outside
21 the Commission's jurisdiction.

22 However, the claims' most important aspects involve facts and theories of tort and
23 contract far afield of the Commission's area of expertise and statutory
24 responsibility. Indeed, appellant's tort and contract claims are the type of
25 traditional claims with which our trial courts of general jurisdiction are most
26 familiar and capable of dealing.¹³

27 The *Kelly* court concluded the complaint should proceed in court.

¹⁰ *Qwest v. Kelly* at 28.

¹¹ *Id.* at 32, quoting *Campbell v. Mountain States Telephone & Telegraph Co.*, 120 Ariz. 426, 586 P.2d 987 (App.1978).

¹² Minute Entry dated January 5, 2011.

¹³ *Qwest v. Kelly* at 32.

1 [The] complaint raises claims that revolve "around a central inquiry: whether,
2 under traditional judicial principles, [Qwest] committed a civil wrong against [the
3 tenants]." Likewise, as in Campbell, "these issues predominate, [therefore] it is
4 clearly not essential for the courts to 'refrain from exercising (their) jurisdiction
5 until after 'the specialized administrative agency' has determined some question
6 or some aspect of some question arising in the proceeding before the court."¹⁴

7 It is not necessary to accept Swing First's interpretation of *Kelly*; Johnson fully
8 understands what *Kelly* really stands for. Here is what Johnson told the Court that the *Kelly* case
9 means:

10 The court held that plaintiff's claims did not implicate technical issues peculiar to
11 the utilities industries, but rather "revolve[d] 'around the central inquiry: whether,
12 under traditional judicial principals, [Qwest] committed a civil wrong against [the
13 tenants]." Although the subjects of "tariffs" and "rates" would certainly come up
14 in the litigation, the technicalities of those subjects were not central to the dispute.
15 In that regard, the superior court was found to be fully capable of adjudicating the
16 claims, obviating the need to defer to the ACC under the doctrine of primary
17 jurisdiction.¹⁵

18 **III THE COMMISSION HAS NO JURISDICTION OVER JOHNSON'S SO-CALLED** 19 **COUNTERCLAIMS**

20 The Commission has "no implied powers and its powers do not exceed those to be
21 derived from a strict construction of the Constitution and implementing statutes."¹⁶ The
22 Commission is not a court of general jurisdiction.

23 The legislature provided the Commission jurisdiction to hear complaints from customers
24 concerning violations by public service corporations.

25 Complaint may be made by the commission of its own motion, or by any person
26 or association of persons by petition or complaint in writing, setting forth any act
27 or thing done or omitted to be done by any public service corporation in violation,
28 or claimed to be in violation, of any provision of law or any order or rule of the
29 commission ...¹⁷

30 The legislature did not enlarge the Commission's jurisdiction to hear complaints from
31 public service corporations against customers. Nor is there anything in the Constitution that

¹⁴ *Id.* at 34, citing *Campbell*.

¹⁵ Plaintiff's Response to Defendants' Motion to Dismiss and Memorandum of Points and Authorities, dated May 7, 2008, at p. 4. Citations omitted.

¹⁶ *Commercial Life Insurance Co. v. Wright*, 64 Ariz. 129, 139, 166 P.2d 943, 949 (1946).

¹⁷ A.R.S. § 40-246A.

1 would allow the Commission to hear a complaint by a public service corporation against a
2 customer. If a public service corporation has a claim against a customer, it can only be brought
3 in court.

4 Johnson is indisputably a public service corporation.¹⁸ Swing First is Johnson's
5 customer. The Commission does not have jurisdiction to hear claims or counterclaims by
6 Johnson against its Swing First.

7 Again, Johnson knows that the Commission does not have jurisdiction to hear its claims
8 against Swing First. For the Court, Johnson illustrated the consequences of a contrary view.

9 The judicial system would be off-limits for every claim brought by a utility
10 provider against a customer who was delinquent in paying his or her utility bill
11 according to the terms of the applicable service contract. The ACC would need to
12 hire an army of hearing officers to handle all the claims brought by [Johnson],
13 Arizona Public Service, Qwest, and every other public service corporation trying
14 to collect from those customers.¹⁹

15 **IV This Case Has Not Proceeded Too Far**

16 Johnson argues on October 4, 2011, that this case has proceeded too far for Swing First to
17 withdraw its complaint. This is ludicrous for two reasons:

18 First, Johnson's argument is belied by its own statements. Just two weeks earlier, on
19 September 21, 2011, Johnson urged Swing First to withdraw its complaint, agreeing that it would
20 be a waste of the parties' resources to try the case. The case has not proceeded at all since
21 September 21. It is nonsensical to maintain that the case has somehow proceeded too far in just
22 two weeks.

23 Second, Johnson also submitted the following proposed procedural schedule to be
24 followed if Swing First did not withdraw its complaint.

Update (if any) of SFG Direct Testimony	Monday, October 24, 2011
Johnson Utilities Rebuttal Testimony	Friday, December 23, 2011
SFG Surrebuttal Testimony	Monday, January 23, 2012

¹⁸ Constitution, Article 15, § 2.

¹⁹ Plaintiff's Response to Defendants' Motion to Dismiss and Memorandum of Points and Authorities, dated May 7, 2008, at 5.

End of Discovery

Wednesday, January 25, 2012

Johnson Utilities Rejoinder Testimony

Monday, February 6, 2012

Hearing (estimated three days)

Tuesday, February 14, 2012

As is clear from the proposed schedule, this case has barely begun; it has hardly proceeded at all. Johnson is not prejudiced in any way by Swing First's withdrawal of its complaint.

V Trying Two Cases Simultaneously Would Severely Prejudice Swing First

On September 9, 2011, Swing First filed a copy of the Court's scheduling order, which shows that trial is scheduled to begin on March 13, 2012, less than six-months from now. The Judge has stated that he is unlikely to allow any further delays. Until March, the parties will be quite busy with depositions, dispositive motions, mediation, and trial preparation.

Johnson is represented by one law firm at the Commission and two more firms in the Court case. Swing First is represented by the same sole practitioner in both dockets. Johnson is owned by a multi-millionaire. Swing First is owned by an LLC, managed by a young man just getting started in life. It would severely prejudice Swing First to force it to try these cases at the same time.

VI Swing First Does Not Need Johnson's Permission to Withdraw Its Complaint

Swing First does not need Johnson's permission to withdraw its complaint. However, even assuming *arguendo* that Johnson's permission was required, that permission was granted. Johnson did much more than state that it agreed to a withdrawal, it urged Swing First to withdraw its complaint.

Further, as just discussed, the Commission lacks jurisdiction to consider Johnson's so-called counterclaims. The Commission is in the position of an Arizona court considering non-jurisdictional counterclaims (perhaps federal claims or claims barred by statutes of limitation). Non-jurisdictional counterclaims cannot be asserted to oppose a complaint withdrawal.

Essentially, Johnson is telling the Commission that Swing First cannot withdraw its own complaint because Johnson has filed non-jurisdictional counterclaims. Johnson would turn the legislature's limited grant of jurisdiction to hear customer complaints into a trap from which a

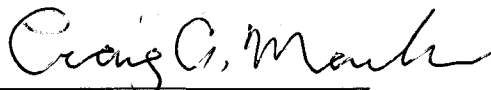
1 customer cannot escape. This would have a chilling effect on the willingness of a customer to
2 file a legitimate complaint if it would be forced to deal with utility counterclaims and could not
3 withdraw its complaint.

4 **VII CONCLUSION**

5 Johnson's Response is a deeply cynical attempt to manipulate the Commission's
6 complaint process to harm Swing First. Johnson asks the Commission to assist Johnson's long-
7 running campaign to bleed Swing First dry. Swing First is confident that the Commission will
8 not allow itself to be used so transparently.

9 Johnson's Response is meritless and should be rejected.

10 RESPECTFULLY SUBMITTED on October 7, 2011.

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